

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-280-C - ORDER NO. 2005-484
SEPTEMBER 26, 2005

IN RE: Application of Time Warner Cable)	ORDER DENYING
Information Services (South Carolina), LLC)	REHEARING OR
DBA Time Warner Cable to Amend its)	RECONSIDERATION
Certificate of Public Convenience and)	
Necessity to Provide Interexchange and Local)	
Voice Services in Service Areas of Certain)	
Incumbent Carriers who Currently have a)	
Rural Exemption.)	
)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing or Reconsideration of Order No. 2005-412 filed by Time Warner Cable Information Services (South Carolina), LLC (Time Warner, TWCIS or the Company). Because of the reasoning stated below, the Petition is denied and dismissed.

In its Petition, TWCIS asserts that the Commission erred in several respects. First, TWCIS contends that the Commission erred in finding that there was a failure of proof regarding the original Application. Petition at 2, paragraph 3. The Company further asserts that this Commission failed in finding that there is a failure of proof because TWCIS failed to request a waiver of the Rural Local Exchange Carriers' (RLECs') rural exemptions under 47 U.S.C. Section 251(f)(1) in this proceeding, and further contends that the Commission erroneously held that TWCIS "should have sought to pierce the rural exemption in this certification proceeding." Petition at 3, paragraph 4; Petition at 4, paragraph 7. These assertions are without merit.

First, the Commission's finding that there is a failure of proof with respect to the original Application is clearly supported by the evidence of record. There was a major discrepancy between the Application, the prefiled testimony, and the testimony presented at the hearing as to what authority the Company was seeking. The Application described the service for which it was requesting certification as follows: "TWCIS plans to provide facilities-based local and long distance Internet protocol ("IP") voice service, targeted to the residential market in [RLECs'] service areas..." TWCIS Application at paragraph 9. When TWCIS filed testimony in support of its Application, its position changed. Although the original Application was not amended, TWCIS sought different authority in its testimony. Ms. Patterson stated in her prefiled testimony that TWCIS intended to remain a certificated carrier and would obtain interconnection service from incumbent LECs and eventually offer wholesale services to the newly created non-regulated utility. TR at 16 (Julie Y. Patterson prefiled direct testimony at p. 5, ll. 18-23). At the hearing, TWCIS once again changed its description of the services for which it was seeking certification, by making references to seeking authority to provide "telecommunications services" as a "full-fledged CLEC." See, e.g., TR at p. 119, ll 10-12. TWCIS now argues that "the Commission ignored numerous instances in which Ms. Patterson testified that TWCIS seeks to amend its initial certification order to be a full-fledged CLEC in the service territories of the [RLECs]." TWCIS Petition at p. 3. This request to amend the initial certification, however, is not reflected in TWCIS's Application or in Ms. Patterson's pre-filed testimony in this proceeding. Further, it is not clear from the references to being a "full-fledged" or "fully regulated" CLEC as to exactly what services TWCIS seeks to provide. See, e.g., TR at 29, 35, and 119. The Commission's rules

require that “Applications shall state clearly and concisely the authorization or permission sought...” S.C. Code Ann. Regs. 103-834(A). However, if Time Warner intended to change its position with regard to the authority that it sought, it never sought to amend its original Application except on a *de facto* basis through testimony, which itself was unclear.

Upon reflection, it is still not clear exactly what authority TWCIS is seeking in this proceeding. However, upon viewing the hearing transcript along with the Application, there is substantial evidence in the record to support the Commission’s finding that TWCIS appears to be seeking only authority to enter into negotiations toward interconnection agreements with the RLECs. See No. 2005-412 at 5. Specifically, it appears that TWCIS is interested in receiving certification as a telecommunications carrier as a vehicle for obtaining network interconnection and other services from incumbent local exchange carriers like the RLECs. TWCIS would then provide those functionalities to its soon-to-be-created non-regulated entity, which would provide the IP local telephone service to end users. See, e.g., TR at 8-9 (“One reason we want to be certified is...we want to be able to negotiate Interconnection Agreements”); TR at 16 (“TWCIS intends to remain a certificated carrier and will obtain interconnection services from incumbent LECs and eventually offer wholesale services to the newly created non-regulated entity.”); TR at 38 (“At this point, we seek to obtain interconnection agreements and provide wholesale services to ourselves and to others and to tariff a wholesale offering”); TR at 56 (“We seek to provide a variety of non Internet protocol format telecommunications services in order to provide retail VoIP services and other services throughout the state of South Carolina”); TR at 56-57 (“[R]eally what we’re looking to

do here is to be able to step in and provide all of those transport and other telecommunications services that you show on the board that are provided [to TWCIS] today by MCI”); TR at 70 (“We need certification in order to obtain interconnection rights”) TR at 128 (“What we seek through this proceeding is the ability on our own, as full-fledged telecommunications carriers to obtain interconnection agreements on our own”). Viewing the evidence as a whole, it is clear that the Company failed to prove the allegations of its original Application. Therefore, Time Warner’s first allegation of error is without merit.

Furthermore, the finding that the Company could not obtain waiver of the rural exemptions in this proceeding because they are not at issue in this case is factually correct and does not prejudice TWCIS in any way. TWCIS acknowledged that it is not seeking to terminate rural exemptions in this proceeding. See TR at 18 (Patterson prefiled testimony at 7, ll. 15-23). TWCIS’s assertion that the Commission held that TWCIS “should have” sought to terminate rural exemptions in this case is not reflected in the language of this Commission’s order. This Commission merely noted that the rural exemptions were not at issue and made it clear that the order should not be read to waive or terminate those exemptions. See Order No. 205-412 at 5 (“Since, as amended at the hearing, the rural exemptions of the RLECs are not at issue in this case, we cannot waive those exemptions.”); Order No. 2005-412 at 6 (“Obviously, this Order should not be construed as a ruling on the waiver of the rural exemptions in this case, since this issue was not before the Commission.”) This appears to be an undisputed point. Id., See also TR at 18 (Patterson prefiled direct testimony at 7, ll. 15-23).

TWCIS further asserts that the Commission's order violates Section 253(a) of the Telecommunications Act of 1996 because it allows the RLECs to "effectively prohibit competition within their service areas until such time as they choose to interconnect with CLECs." See Petition at 3, paragraph 6. This Commission's order does not constitute a barrier to entry within the purview of the Act.

TWCIS argues that this Commission is somehow denying TWCIS the right to provide competitive service within the RLECs' service areas. See Petition at 3. Yet TWCIS itself stated to the Commission that it does not need certification to provide the competitive service it seeks to provide within the RLECs' service areas. See TR at 16 (Patterson prefiled direct testimony at 5, ll 18-19). TWCIS filed an Application seeking certification for its residential facilities-based local IP service offering. At the hearing, it stated that it did not need certification for that service, but would like to have a certificate for "other" services, to which it only made vague references. This Commission properly denied TWCIS certification with respect to the Application it filed because, as we found in our previous order, there was a failure of proof with respect to the original Application, as discussed above.

Further, if TWCIS' IP service is indeed a "telecommunications service," then TWCIS would be a "telecommunications carrier" and would be entitled to seek interconnection under Section 251 of the Act. See 47 U.S.C. Section 153(44), which defines "telecommunications carrier" as a provider of "telecommunications service." See also 47 U.S.C. Sections 251(a)(1) and 251 (c)(2). Assuming that TWCIS is a telecommunications carrier, then there is no barrier to entry because, as we stated, TWCIS does not need this Commission's approval to proceed under Section 251. See

Order No. 2005-412 at 5. If on the other hand, TWCIS is not a telecommunications carrier because it is not providing a telecommunications service, then Section 253 of the Act does not even apply.

In addition, TWCIS also contends that this Commission's ruling that TWCIS has the ability to negotiate interconnection agreements without being certificated violates state law and is erroneous as a practical matter. See TWCIS Petition at 5, paragraphs 8 and 9. This is incorrect. As noted above, TWCIS either has the right to request interconnection under Section 251 of the Act or it does not, depending on whether the services TWCIS seeks to provide are telecommunications services or not, which is an unsettled question under Federal law. Again, TWCIS does not need this Commission's approval to request interconnection under Section 251 of the Act. See Order No. 2005-412 at 5. The State statute cited by TWCIS, S.C. Code Ann. Section 58-9-280(C)(1) specifically states that its provisions "shall be consistent with applicable federal law." Therefore, if, as TWCIS suggests, it is entitled under Section 251 to obtain interconnection in order to provide a service for which it asserts that it does not need state certification, then Section 251 of the Act would govern.

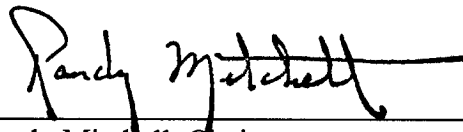
Finally, TWCIS contends that the Commission's decision is arbitrary and capricious because TWCIS met the statutory certification requirements. See Petition at 6, paragraphs 10-11. As discussed above, however, TWCIS's Application was not sufficient and the authority sought by TWCIS was, at best, unclear. This allegation of error is without merit.

Moreover, TWCIS's assertion that it need not demonstrate a need in order to be granted a Certificate of Public Convenience and Necessity is perplexing. See TWCIS

Petition at 1 (“lack of immediate need for a certificate is not a valid ground for withholding one.”) TWCIS’s apparent belief that it is only required to show that it has the technical, managerial, and financial ability to provide services in South Carolina in order to receive a certificate essentially ignores half of the certification statute, and would allow carriers to receive a certificate even when they do not state with specificity the services for which they request certification. This position is contrary to state law, ignores the statutory role and duties of the Commission, and must be rejected.

Accordingly, because of the above-stated reasoning, the Petition for Rehearing or Reconsideration of Order No. 2005-412 filed by TWCIS is denied and dismissed. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Randy Mitchell, Chairman

ATTEST:



G. O'Neal Hamilton, Vice-Chairman

(SEAL)